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QUESTIONS PRESENTED

1. Whether a FERC order, allocating the power and costs of a nuclear plant among affiliated operating companies, "facially" preempted a state prudence order that adjusted one such company's retail rates to reflect its negligence in failing to reduce its risks and, on *factual* findings not contestable here,

(a) the company could have sold off power to reduce its risks and still have complied with FERC's orders;
(b) the company said it could make such sales but was negligent in failing to do so;
(c) such sales, would have significantly lowered the company's costs,

and where this Court previously stated that, "Nothing in this is directly, or even indirectly, foreclosed" by federal law and remanded for "further factual inquiry." *New Orleans Public Service, Inc. v. Counsel of the City of New Orleans*, 491 U.S. 350, 367 (1989); and where the issue could not properly have been raised at FERC.

2. Whether the federal district court should have determined the merits hereafter a state court of competent jurisdiction had entered a final judgment determining such merits, in that Section 1738 of Title 28 U.S.C. required the federal court to give the same "credit" to said judgment as due within the state, and state law made such judgment "conclusive" of all similar actions between the same parties and required their dismissal.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1156

NEW ORLEANS PUBLIC SERVICE INC.,
Petitioner,

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, *ET AL.*
Respondents.

BRIEF OF RESPONDENTS,
THE COUNCIL OF THE CITY OF NEW ORLEANS, *ET AL.*

STATUTORY PROVISIONS

The pertinent portions of federal and Louisiana statutes are reprinted as an Appendix hereto.

COUNTERSTATEMENT OF THE CASE AND PROCEEDINGS BELOW

Most of the factual matters described below are treated with more particularity in the prudence "Determinations and Order," J.A. 63-279, (hereinafter, the "Rate Order"). References to relevant sections of the Rate Order are thus set forth where appropriate.

1. The Parties [J.A. at 63-65]

The City of New Orleans is a Louisiana municipal corporation. The Council is invested with "all powers of supervision, regulation and control over any" public utility within the city. Its regulatory power is recognized by the Louisiana Constitution. J.A. at 63-64.

NOPSI[1] is engaged in the retail sale of electricity entirely in New Orleans. Its right to operate there derives from acts of the Council (and its predecessor) which authorize NOPSI "to charge and collect such fair and reasonable rates . . . as may be established by the City." J.A. 65.

NOPSI is a subsidiary of MSU, and is the smallest of the four MSU operating company subsidiaries. (The others, AP&L, LP&L and MP&L, provide service in neighboring regions and are separately regulated). MSE (now named "SERI") is MSU's generation subsidiary and owns a 90% interest in Grand Gulf.

2. Characteristics of the "System" [J.A. at 105-122]

Petitioner misportrays The MSU "system" as precluding the need for responsible managent of NOPSI, but it does not do so. The "system" is an electric "power pool" operated as a single integrated and highly coordinated system, J.A. 106—that is, the generating units of individual companies are interconnected by high voltage transmission lines, J.A. 106, and such units, each with a different operating cost, are centrally "dispatched" (brought into utilization) so as to reduce overall costs, J.A. 119. Decisions to build generation plants are based on all the companies' needs and made "for the system as a whole," *Middle South Energy, Inc.*, Opinion 234, 31 FERC ¶ 61,305, 61,650, *aff'd*, 32 FERC ¶ 61,425 (1985)—that is, a proposal for a new generation plant contemplates the projected "loads" of all companies, and this approach promotes such economies as are available in scale, fuel mix and site selection. (*Id.*)

However, each plant has been built, owned and operated by an operating company individually, except Grand Gulf, as described *infra*. J.A. 106. Each operating company has

[1] The names of the parties and the Middle South companies are abbreviated as in petitioner's brief. Petitioner is also referred to as NOPSI, and its brief is cited as "Pet. Br.." That of the Solicitor General as *amicus* is cited as "S.G. Br.."

been responsible for developing its own load forecast, which is combined with others by the Middle South Operating Committee ("MSOC"). J.A. 113-115. The MSOC makes an initial determination of the size and location of a new plant and assigns its construction to an individual company. J.A. 115. Each such company makes specific decisions as to the plant's size, location and type, and is responsible for financing and constructing it, or it may challenge the initial "system" assignment and propose another course. J.A. 114-115, 125-126; 31 FERC at 61,647-61,650, 61,653.

Each company's building a plant or contracting for power, or not doing so, have been the principal determinants of its power costs. J.A. 119. There has been a marked disparity among such companies' power costs, which has resulted, not from "centralized planning," (compare Pet. Br. at 6), but because centralization is incomplete, J.A. 119-120, since there has been neither overall production cost sharing nor joint plant construction. *See Middle South Energy, Inc.*, 30 FERC ¶ 63,030, 65,167 (1985); *Middle South Energy, Inc.*, Opinion 234-A, 32 FERC ¶ 61,425, 61,955, 61,959 (1985). Thus, the 1973 System Agreement[2] did not "equalize" the companies' power costs, but rather provided a formula for apportioning only the companies' responsibility for certain *excess* power, and the 1982 System Agreement operates similarly, with certain changes in the formula.[3] Further, the variable costs of generation are allocated first to a unit's owner, and then according to the requirements of other companies. J.A. 119; CNO Exh. 29 at 237; 32 FERC at 61,955. In recon-

[2] At NOPSI's instance, the 1973 System Agreement is reprinted in the Joint Appendix, and NOPSI cites it here directly in support of certain arguments, notwithstanding that the question before the Court is one of "facial" preemption, independent of the factual record. The *actual* practices of the MSU companies are not self-evident from the formal terms of the agreement and required separate testimony. *See* J.A. 105-122; 31 FERC at 61,645-51; 32 FERC at 61,952-955.

[3] The operation of the formula is described under "Cost Allocation Under The 1973 System Agreement" at J.A. 115-119; and changes therein in the 1982 System Agreement at J.A. 140.

sidering its initial descriptions of system costs, FERC recognized that the system agreements had achieved only "rough equalization;" did not result in the MSU companies paying an equal or proportionate basis for power; and left each company's costs based largely on its plant ownership and power contracts. 32 FERC at 61,959.[4] Over a period of 20 years, NOPSI had experienced the highest power costs in the "system"—exceeding those of AP&L, for example, by over 50%.[5] J.A. 120-122.

Thus, the planning and building of plants for the "benefit of the system as a whole" has never obviated the need for each company to determine its own specific power commitments. Under federal law, a utility "system" may not be so large as to "impair" the "advantages of localized management, efficient operation and the effectiveness of regulation."[6] The system agreements specifically placed responsibility individually on each company to "own, or have available to it under firm contract," power as is "necessary to supply all the requirements of its customers." J.A. 112-113. According to petitioner's president, "Neither the affiliation of the MSU operating companies" nor the "existence of the" [MSOC] "relieves any MSU operating company from its public utility duty to serve its load." J.A. 113. Thus, to meet their own needs for power and diversification, the MSU companies individually bought and sold power. For example, during the 1970's, AP&L built

[4] In Opinion 234-A, FERC stated, "We also recognize, although it is not emphasized in the Opinion [234], that pool members have first call on the power and energy produced by units which they own;" Opinion 234-A, 32 FERC at 61,955; and that its decision to leave the prior non-nuclear cost system intact "allows the individual companies to *retain* as fully as possible the benefits of units *they* have financed and constructed." 32 FERC at 61,959 (emphasis added).

[5] FERC's statement that earlier costs were "*roughly* equalized" tends to mask preexisting differences but reflects that they were *dwarfed* by the massive disparities threatened by the companies' allocation of Grand Gulf costs. *See Middle South Energy, Inc.*, 26 FERC ¶ 63,044, 65,110 (1984).

[6] Public Utility Holding Company Act, 15 U.S.C. §79b(a)(29).

certain coal-fired plants; it sold some off-system, and MP&L bought some, while NOPSI bypassed the opportunity. The system agreements do not hinder such transactions and, indeed, have evolved so as to facilitate them.[7] J.A. 130-132, 198-200.

FERC concluded that the MSU system was sufficiently "integrated" to justify reallocation of power among the companies, 31 FERC at 61,649-51, but FERC disclaimed any implication that it had failed to recognize the independent characteristics of the companies. 32 FERC at 61,952-53, 61,955.[8] Further, FERC never addressed the separate question of each company's responsibility to adjust its power arrangements to meet its local needs once its obligations to the "system" were met, a subject beyond the scope of its jurisdiction. *See* pp. 9-11, 37-38, *infra*.

3. Grand Gulf I and Other Generation Additions [J.A. 122-132]

Until recently, the generation plants on the system were fueled by natural gas or oil. In the late 60's, the supply

[7] ALJ Liebman's findings, endorsed by the FERC, noted that the "system goal" of greater ownership of nuclear and coal units did not imply or require a particular allocation of nuclear power to a particular MSU operating company. 26 FERC at 65,108. In its Brief on Exceptions in Docket No. ER82-616 (Mar. 5, 1984), at 48 MSE stated, "[A]lthough the system as a whole might have sufficient coal and nuclear capacity, those companies lacking access to such generation through either ownership or a unit power purchase would remain vulnerable to the uncertainties in price and availability of oil and natural gas."

[8] The premise of the FERC's analysis was that if it found the MSU system sufficiently "integrated," it could reallocate Grand Gulf 1 costs among the companies, but that if the companies were "autonomous" it would not be appropriate to do so. 31 FERC at 61,645; 32 FERC at 61,953. The FERC approached the problem notionally, without articulated benchmarks for "integration" or "autonomy," or the effects that would attend either, and it directed its determinations principally at AP&L, 26 FERC at 65,113, to undo "the scheme of absolving AP&L of all responsibility for Grand Gulf." *Mississippi Indus. v. FERC*, 808 F.2d 1525, 1533 (D.C. Cir), *vacated in part*, 822 F.2d 1104 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 985 (1987).

of gas became scarce, and pipeline companies curtailed deliveries; in the early '70's, an international embargo made oil prices higher and volatile; and such events pushed the MSU companies toward other fuel alternatives. J.A. 124-125. In 1970-71, the companies' load forecasts showed the need for the additional generation capacity. J.A. 125. MSOC commissioned a study that resulted in its recommending two nuclear plants as most economic for this purpose. J.A. 125. One plant was assigned to MP&L, and the other to NOPSI to be built in New Orleans. J.A. 125-126. However, a site engineering study and the rising costs of nuclear plants caused NOPSI to terminate its nuclear effort, and MP&L undertook both projects. J.A. 126.

Because MP&L could not obtain financing, the backing of all the operating companies was enlisted. In 1974 each MSU operating company entered into the "Availability Agreement," and thus obligated itself to take and pay for an indeterminate amount of power. J.A. 127-128. Although not a necessary choice, plant ownership was placed in a new subsidiary, MSE (now "SERI"). *Id.*[9]

As Grand Gulf's construction advanced, the companies' load forecasts fell. Further, during the 1970's, the real (inflation-adjusted) costs of nuclear plants increased rapidly, due primarily to additional construction requirements,[10] including retrofits, impelled by growing safety

[9] Although the system's overall goal was to move to a 50-50 mix of nuclear and coal generation, J.A. 125, NOPSI's management made no commitment to obtain coal-fired generation and had no prospect of participating in a coal plant for at least a decade, and that prospect never materialized. Other MSU companies made individual commitments to buy or to build coal-fired generation. J.A. 125, 130-132.

[10] Petitioner's brief omits reference to the new "construction requirements" that added the principal *real* costs to nuclear plants. It also attributes cost increases only to regulatory delays and inflation and indicates that cost problems arose only after the Three Mile Island ("TMI") incident (Pet. Br. at 6-7), all of which is incorrect. *See* J.A. 133, 173. The *real* (inflation adjusted) cost of constructing nuclear plants had more than *doubled* during the 1970-1978 time period. J.A. 190. The TMI incident in March 1979 ultimately resulted in *even greater*

concerns. Such costs were augmented by regulatory delays and spiraling inflation. By the end of 1978 (four years after its initiation) the projected cost of Grand Gulf had increased over 60%. J.A. 133. Further, in March 1979, a major accident occurred at the TMI nuclear plant. Particularly because of the accident's unanticipated nature, it precipitated a national safety inquiry and prospective cost increases for nuclear plants still under construction. J.A. 135; 180-184.

The FERC never determined the point in time when the anticipated benefits of Grand Gulf power first appeared questionable. Nor did FERC indicate *when* the costs or problems of nuclear units were "unforeseen" (*compare* Pet. Br. at 7 *with* 31 FERC at 61,655). Nor did it state that the cost increases "between 1980 and 1985" were "unexpectedly dramatic," but rather it put no time frame on this observation. *Compare* Pet. Br. at 7 *with* 31 FERC at 61,654. (In contrast, FERC *did* say that *by 1979* the system appeared to have recognized that there were cost-related problems unique to nuclear units, 31 FERC at 6 ,655 n.16—an observation consistent with that of the Council's. J.A. 167.) Further, there simply was no FERC "finding" on the prudence of continued plant *construction*, *see* pp. 9, 45-46, *infra*, much less on the issue of whether it was advisable for an operating company to resell some of its power—two questions that involve materially different considerations.[11] (The Council, in turn, made *no* finding re-

safety-driven construction changes, retrofits, and cost escalations, J.A. 180-84. Petitioner's ostensible purpose is to suggest that the large cost increases were only inflation-based and that petitioner's management could not be aware of the potential for increased costs due to safety-driven construction requirements. *Compare* J.A. 171-73, 180-84.

[11] Whether to *complete* a plant depends materially upon *how far* construction has proceeded—and specifically on whether the (1) "to go" (additional) costs of construction, together with the plant's anticipated operating costs, are less than the (2) cost of terminating construction and mothballing the plant *plus* the cost of the most economical alternative source of power in the quantity needed. In contrast, the decision whether to retain all the power from a plant does not depend in the same way on the extent of completion but on whether the (1) *total*

garding continued plant construction—and it examined only whether NOPSI should have retained all the power it stood to receive. J.A. 70-72)

4. 1980 Hearings Before the Council [J.A. at 141-143]

During the construction of Grand Gulf, NOPSI's management was grossly negligent in failing to exercise oversight over NOPSI's Grand Gulf obligation. *See* J.A. 70-72, 161-171, 184-188. Further, in the wake of TMI, with the economics of Grand Gulf in question, NOPSI's management inexplicably committed in January 1980 to take a huge share of both Grand Gulf I and Grand Gulf II—about 30% of the MSE share, several times NOPSI's system load share (8.4%). J.A. 136. NOPSI's management also agreed that AP&L—a politically powerful company—need take none. This, according to petitioner's own witness, occurred when "everyone knew what the costs of the unit were going to be," CNO Exh. 33 at 856; J.A. 191, or, at least, that previously expected benefits of Grand Gulf were in question. J.A. 202. Without explanation, these acts bypassed the usual MSOC decisionmaking process. 26 FERC at 65,103. FERC found that NOPSI's management had agreed to an unreasonably large share. J.A. 198.

In May 1980, NOPSI sought the Council's approval of an unusual "capacity adjustment clause" to authorize in advance an *automatic* pass-through of NOPSI's 30% share of Grand Gulf costs, portraying its proposal as speeding "benefits" to the ratepayers. J.A. 141-42. This was the first time that NOPSI had even informed the Council of its Grand Gulf commitments. J.A. 141. Under oath, NOPSI's president twice asserted that NOPSI had the option of selling Grand Gulf power to other utilities:

> . . . NOPSI has the option of selling the capacity and marketing it which, we think will be a very attractive commodity to other electric utilities

cost of that power—*i.e.*, sunk costs *and* "to go" costs—plus operating costs, is less than (2) the cost of the most economical alternative power in the quantity needed. The calculations in each instance are different. So are the business considerations. See pp. 44-45, *infra*.

> who will view this as very cheap, reliable power for the future.

J.A. at 143; and again, "[W]e will have the option of selling this unit and our portion of it to some other buyer." *Id.* The Council declined to approve the automatic adjustment clause but took no other regulatory action. J.A. 203.

5. The FERC Proceedings [J.A. at 143-49]

In 1982, MSE commenced proceedings at FERC to seek approval of the companies' Grand Gulf agreements and related matters. At issue was the *allocation* of Grand Gulf costs by formula "among the four MSU operating companies" that sponsored the plant. 31 FERC at 61,632. One proceeding involved the Unit Power Sales Agreement, which set the fixed shares to which the companies had just agreed. Docket No. ER82-616. The other involved the 1982 System Agreement that governs certain aspects of the planning of generation and transmission facilities and the allocation of excess generation. Docket No. ER82-483.

No prudence issues—not even those investing in, constructing or completing Grand Gulf—were raised.[12] ALJ Liebman made clear that he would not venture into matters regarding the responsibilities of, or prudence of, the individual operating companies, twice stating, "I'm not getting into that," J.A. 101, and refused to be drawn into the preclusion of state-level prudence reviews. *Id.*

FERC issued one order, Opinion No. 234 (affirmed in Opinion No. 234-A), for both cases, rejecting the agreed upon allocations. 31 FERC at 61,655. It found that power planning was highly coordinated, that plants were built for the system as a whole, and that Grand Gulf had been planned for all companies from the outset—findings providing a basis for reallocation. 31 FERC at 61,632-33. (*See* n.8 *supra*.) It determined that the costs of all nuclear plants should be shared because of their unique problems;

[12] It bears emphasis that the order "defining and limiting" the issues to be considered to fifteen specified matters did not include any "prudence" issue among them. 26 FERC at 65,096-65,097.

and that other generation costs should not be shared so as "to allow the individual companies to retain the benefits of units which they have been responsible for constructing." 32 FERC at 61,955. It adopted a formula for the allocation of Grand Gulf costs that allowed each company to retain the benefits of any nuclear plant it had constructed, *viz*: (1) each company's share of total system nuclear investment was established; and (2) any "shortfall" between that share and the company's actual nuclear investment was made up by a share of Grand Gulf I. 31 FERC at 61,655. It reduced NOPSI's 29.8% share to 17%, and it allocated a share to AP&L. *Id.*

Wholesale rates followed from the application of that formula. FERC declined to determine how such costs should be recovered in retail rates. It declined even to address a phase-in ("levelization") of such rates that would have impact at the retail level, lest the "bright line" of its jurisdiction be crossed, 26 FERC at 65,148; and it did not order states to refrain from retail inquiries.[13] Instead, FERC noted its limited jurisdiction, acknowledged the traditional role of the states in retail matters, 32 FERC at 61,951-52, and concluded that "[t]he basic nature of regulatory control retained by the states under previous System agreements remains unchanged." *Id.* at 61,952.

FERC confirmed in Congressional testimony that the responsibilities of the operating companies were not a subject for consideration because no rate had been filed in which such companies tried to pass on *their* costs:

> The proceeding was not one in which the operating utilities attempted to pass through the actual costs associated with the Grand Gulf plant as purchased power expenses in rates charged to their customers.

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[13] *Middle South Energy, Inc. and New Orleans Pub. Serv. Inc. v. City of New Orleans*, No. 85-5273, slip op. at 7, (E.D. La. Dec. 19, 1986), *aff'd, New Orleans Pub. Serv. Inc. v. City of New Orleans*, 833 F.2d 583 (5th Cir. 1987). ("*NOPSI II*")

and that,

> [T]he Commission has taken the position that the prudence of a party as the *purchaser* in an individual unit sale transaction is not generally within the scope of the issues considered in reviewing the rates and terms for the jurisdictional *sale* of power.[14]

6. CNO's Position and the Judicial Review of the FERC's Order

Petitioner misportrays, in conflict with FERC's own recitals, New Orleans' position in FERC and subsequent review proceedings so as to imply that FERC had made determinations inconsistent with those in the prudence hearings. New Orleans argued successfully against the agreed-upon allocations, *see* 26 FERC at 65,105. It also argued that any *inter*company reallocation should be limited to Grand Gulf and should be based on each company's "responsibility ratio" because (1) the initial justification for Grand Gulf had been to meet projected load growth; and (2) certain FERC precedent supported that allocation method. 26 FERC at 65,112-113. FERC answered that (1) the justification for Grand Gulf had changed to fuel diversification; and (2) the precedents involved all system plants, rather than one. *Id.* New Orleans then argued that any reallocation extending beyond Grand Gulf should encompass *all* plants on the system. 31 FERC at 61,642. FERC responded that although all plants had been built "for the system" only the nuclear plant costs should be reallocated since they were larger. 31 FERC at 61,655. The Court of Appeals rejected[15] FERC's determination on

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[14] *Powerplant Costs: Hearing Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. 29, 21 (1986) (Statement of FERC Acting Chairman) (emphasis in original).

[15] On appeal, the FERC's decision was remanded for reconsideration. *See Mississippi Indus. v. FERC*, 822 F.2d 1104, 1105 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 985 (1987). On November 30, 1987, the FERC issued Opinion No. 292 in which it confirmed its prior allocation, *System*

the strength of Judge Bork's opinion (1) challenging the rationale of FERC noted above; and (2) noting that FERC's own decision had resulted in significant cost disparities. *Mississippi Indus.*, 808 F.2d at 1569 (Bork, J. dissenting), *adopted on rehearing*, 822 F.2d 1104 (D.C. Cir. 1987).

On remand, FERC held that its allocation scheme was equitable if its goal of equalizing nuclear investment costs were tested by demand, rather than by capacity, 41 FERC at 61,617, and defended its singular focus on nuclear plants because of their costs. *Id.* at 61,620. New Orleans' arguments there relied upon basic allocation principles, *viz*: (1) similar rates for similarly treated customers; (2) preservation of cost equalization; and (3) matching costs and benefits, and were so characterized by FERC. *Id.* at 61,621. The FERC's decision to maintain its prior allocation decision had virtually nothing to do with the issues involved in the subsequent prudence inquiry.[16]

7. NOPSI's Rate Application and the Filing of *"NOPSI I"* [J.A. at 150-154]

On May 17, 1985 (two days after the Council reacquired regulatory authority from the LPSC[17]), NOPSI applied for a retail rate increase to reflect its Grand Gulf costs as set by the FERC. Grand Gulf had been placed in service at

Energy Resources, Inc., 41 FERC ¶ 61,238 (1987), which was upheld. *City of New Orleans v. FERC*, 875 F.2d 903 (D.C. Cir. 1989), *cert. denied*, 110 S.Ct. 1305 (1990).

[16] Petitioner seems to imply that the issue of NOPSI's not having coal power was resolved by FERC, Pet. Br. at 10 n.12. However, the issue FERC addressed was whether NOPSI's lack of coal-fired power should be a factor in establishing the formula by which the *relative* intercompany shares of nuclear power should be *allocated* (*i.e.*, full production cost equalization would have equalized non-nuclear costs), *not* whether NOPSI (having accepted its allocated share) could take its own lack of coal power into consideration in determining how to diversify.

[17] The Council exercised electric utility regulatory authority from 1922 to November 23, 1981. Pursuant to a referendum, it was then transferred to the Louisiana Public Service Commission ("LPSC") until another referendum returned such authority to the Council in May 1985. J.A. 64 n.1.

a "catastrophically uneconomical" cost,[18] exceeding $3.6 billion, six times its original projection. If passed through fully and immediately, NOPSI's share would have resulted in a 60% rate increase. J.A. 67-68. The ensuing "severe rate shock effect"[19] would have been devastating.[20]

At first NOPSI made a proposal to moderate the rate increase through a "phase-in", but withdrew it when the Council undertook to hold formal hearings. The Council promptly established procedural and filing requirements, which NOPSI sought to avoid. J.A. 151. NOPSI filed a late, partial application. *Id.* at 152. The Council volunteered to *initiate* proceedings to grant NOPSI an interim rate increase and took steps to facilitate any NOPSI application. *Id.* NOPSI *refused* to apply for interim relief, *id.* instead it commenced its first federal suit, *"NOPSI I"* (n.19 *supra*), the purpose of which was (1) to intimidate the Council's members by suing them personally for $1 billion; and (2) to require that Grand Gulf costs be passed through immediately without moderation. *NOPSI I*, Complaint, pars. 53 and 56. The district court found that the Council was acting responsibly[21] and directed NOPSI to apply for the interim rate relief. The Council then granted

[18] *Mississippi Indus.*, 808 F.2d at 1528.

[19] *New Orleans Pub. Serv. Inc. v. City of New Orleans*, No. 85-3398, slip op. at 5 (E.D. La. Sept. 16, 1985), *aff'd*, 798 F.2d 858 (5th Cir. 1986), *modifying* 782 F.2d 1236, (5th Cir.), *cert. denied*, 481 U.S. 1023 (1987) (*"NOPSI I"*).

[20] The unmitigated pass-through of NOPSI's Grand Gulf I costs would have caused the loss of over 6,000 jobs, pushed 1,760 families below the poverty line, reduced state and local tax revenues by over $30 million annually, and had a profound adverse effect on the community's economy. *See* J.A. 68 n.2. There was apprehension as to the potential "death spiral" effect of "rate shock," triggered by passing on unpaid costs to an ever-diminishing base of paying customers.

[21] The district court held that the Council "is utilizing every feasible alternative to keep NOPSI in a positive cash position", and further, that "the Council is determined to assist NOPSI in maintaining a positive cash position by pursuing a number of feasible alternatives." *NOPSI I*, slip op. at 11-12.

such relief and offered more if needed. J.A. 152; Res. R-85-526. The district court abstained and was affirmed (*see* n.19 *supra*).

Promptly upon NOPSI's submission of its application, on October 10, 1985 the Council commenced a prudence inquiry[22] with the objective, as summarized by this Court, to:

> [E]xamine all aspects of NOPSI's relationship with Grand Gulf, including NOPSI's " 'efforts to minimize its total cost exposure for the purchase,' " and Grand Gulf's " 'impact on its other power supply opportunities,' " " 'for the purpose of determining what portion, if any, of NOPSI's Grand Gulf I expense shall be assumed by [NOPSI's] shareholders.' " . . . The resolution specifically provided, however, that in setting the appropriate retail rate, the Council would " 'not seek to invalidate any of the agreements surrounding Grand Gulf I or to order NOPSI to pay MSE a rate other than that approved by the FERC.' "

New Orleans Pub. Serv. Inc. v. Council City of New Orleans, 491 U.S. 350, 356 (1989) (*"NOPSI III"*) (quoting J.A. 153).

NOPSI and MSE filed a second federal action, *NOPSI II*, in November 1985 seeking to bar any prudence inquiry, later narrowing their complaint to seek to preclude any remedy reducing rates. The suit was dismissed on abstention and ripeness grounds in December 1986; and that dismissal was affirmed on ripeness grounds (*see* n.13 *supra*).

The prudence inquiry did not prevent a Grand Gulf rate increase, which was effected through a partial settlement on March 22, 1986. J.A. 67. It provided, *inter alia*, that

[22] A "prudence inquiry" reviews the actions of a utility's management to determine whether it comported with established standards of care at the time in question. See *"The Purpose of and the Standards Governing This Prudence Investigation,"* J.A. 88-97.

NOPSI would receive phased-in increases and would absorb $51.2 million in costs. (All other MSU operating companies had already reached settlements involving phase-ins; and the two largest, LP&L and AP&L, undertook major cost absorptions. J.A. 98 n.31.) The settlement preserved the right to conduct the prudence inquiry, subject to judicial review. J.A. 218-219.[23]

8. The Prudence Inquiry

The prudence inquiry was conducted in three parts. The first, dealing with substantive prudence issues concluded with evidentiary hearings in April 1986. J.A. 68-69. Proceedings regarding the economic impact of possible remedies were held in October 1986. *Id.* at 69. The passage of tax legislation required a third phase for reconsideration of economic issues. *Id.* The Hearing Examiner certified the entire record to the Council on April 16, 1987. *Id.* NOPSI blocked the Council's inquiry into the role of the "system," and insisted that the Council accept some testimony without any opportunity for examination. J.A. 78-88.

The Rate Order issued on February 4, 1988, did not purport to alter the FERC's cost allocation to petitioner or assume a different allocation for the establishment of retail rates, but focused on possible offsets to such costs. J.A. 70-72; 201. The Council took care to conform its proceedings to the law. J.A. 97-105. It found NOPSI's management imprudent based on vivid and overwhelming evidence of neglect and inaction, J.A. 161-170, and for its

[23] Petitioner recites that "to obtain interim relief and avoid insolvency," NOPSI agreed to a settlement. (Pet. Br. at 13 n.18.) This is contrary to the record. In fact, (1) the Council had previously provided interim relief to a recalcitrant NOPSI; (2) the district court found that NOPSI was solvent and that the Council was acting in good faith to maintain NOPSI's position; (3) all the other MSU companies, as indicated, had already reached settlements; (4) NOPSI itself proposed the settlement and did so during a period when it appeared to have won its federal appeal; and (5) its president publicly complimented the Council on its acceptance of the settlement (Tr., Mar. 20,1986 at 7-8, Council No. CD 985-1).

consequent failure to pursue the very risk-reduction measures (offsetting power sales) that NOPSI's management stated it could make consistently with its Grand Gulf obligations. J.A. 142-143; 197-203. The Council "deferred to FERC's" findings but determined that "the utility's management was negligent in failing later to diversify its supply portfolio by selling a portion of its Grand Gulf power." *NOPSI III*, 491 U.S. at 352-53.

The Council determined that the evidence supported a rate disallowance based on a full 17% disposition by petitioner of its share or a disposition reflecting a retention of 9% of it, but, instead it imposed a disallowance of about 3% or $135 million[24]—set to a level that NOPSI could "sustain." J.A. 72-73; 210-212; 242-243. That is, it would permit petitioner (1) to meet its Grand Gulf obligations, (2) maintain its operations, and (3) return to financial health, and it was imposed gradually as a reduction of rate increases over several years. J.A. 242-244.

Although at least 57 utilities were identified as potential customers for nuclear power, J.A. 201, and despite serious doubts raised about its management's inaction, petitioner made no serious effort to contest the availability of buyers in the 1979-80 timeframe. *Id.* at 203. Petitioner asserts that the Council never identified a particular buyer for NOPSI's nuclear power, but it was not the Council's obligation to do so, J.A. 94-97, and petitioner is aware that

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[24] Petitioner's assertion that the Rate Order was based on a finding that would have reduced NOPSI's costs "by the precise amounts that the City" had proposed to FERC (Pet. Br. at 3) is just inaccurate. The 3% reduction is far less than what would have resulted from New Orleans' position at FERC. Petitioner's erroneous statements in this regard were the apparent basis for an error in the original Fifth Circuit opinion below, which was corrected by that Court without objection by petitioner. J.A. 16. Even *if* the Council had held that NOPSI should have sold off an amount that would yield retained power exactly equal to the 8.4% that New Orleans sponsored at FERC, the resulting costs would not have been the same, inasmuch as in one case the remainder would have been priced at coal rates and in the other at "excess" power rates under the system agreement.

there was a major buyer nearby in the very period in question, and potentially many more, but skirted the issue in the evidentiary hearings.[25] There was direct evidence that petitioner's Grand Gulf power was marketable in 1979-1980. J.A. 201; *Alliance for Affordable Energy*, 578 So. 2d 949, 962-64 (La. Ct. App. 1991).

9. This Action and Related State Court Proceedings

Given petitioner's determination to bypass the usual state court review process, the Council promptly commenced an action in Louisiana Civil District Court seeking, *inter alia*, judicial review of the Rate Order,[26] as did a citizens' group, intervenor here.[27] NOPSI then commenced the present action to enjoin the Rate Order on preemption grounds, and it filed a state court action.[28] After the federal district court abstained, *NOPSI v. Council of New Orleans*, No. 88-559, slip op. (E.D. La. Mar. 10, 1988), NOPSI added federal claims to its state action and sought a preliminary injunction.

That application was denied, and the denial affirmed for lack of irreparable harm.[29] The matter was returned to

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[25] In August 1979, another Louisiana utility, Cajun Electric Cooperative, whose electric lines are connected to the MSU transmission system, contracted to purchase a 30% share of the River Bend nuclear plant. See *Gulf States Utilities Co. v. LPSC*, 578 So. 2d 71, 76 (La. 1991).

[26] *Boissiere v. New Orleans Pub. Serv. Inc.*, No. 88-2503 (La. Civ. Dist. Ct. filed Feb. 4, 1988).

[27] *Alliance for Affordable Energy, Inc. v. Council of New Orleans*, No. 88-2502 (La. Civ. Dist. Ct. filed Feb. 4, 1988).

[28] *New Orleans Pub. Serv. v. City of New Orleans*, No. 88-4511 (La. Civ. Dist. Ct. filed Mar. 7, 1988). Petitioner's complaint alleged that the Rate Order was arbitrary, capricious and not supported by substantial evidence; applied an erroneous standard of prudence; breached the March 1986 settlement agreement; violated NOPSI's Louisiana due process rights; and constituted an unlawful "taking.

[29] *New Orleans Pub. Serv. Inc. v. City of New Orleans*, No. 88-4511 (Civ. Dist. Ct. May 5, 1988), *aff'd*, No. 88-CA-1369 (La. Ct. App. Feb. 16, 1989).

state trial court to be heard on the merits. After a delay to await this Court's determination in *NOPSI III* (decided June 19, 1989) and an extended period thereafter for reargument and to hear other issues, the Louisiana court ruled on November 15, 1989 that the Rate Order was not facially preempted and that "each of the findings in the Council's Rate Order is rationally based and is supported by substantial evidence in the record." *NOPSI v. Council of New Orleans*, No. 88-4511, slip op. at 6.

Before that ruling, in September 1989, the Council had moved in federal district court for a stay on the basis of the more advanced state court proceedings. NOPSI moved for summary judgment based on facts which the Council disputed. J.A. 280-325. The court ordered that the prudence evidentiary record be filed (No. 88-559, Minute Entry at 1, Sept. 14, 1989), and it heard argument on October 25, 1989, declined to stay, and took the case *sub judice*.

After the state court rendered its decision on the merits, the Council filed the certified state judgment in federal court and moved to dismiss or alternatively to stay. The federal district court's order, finding no "facial" preemption and staying remaining proceedings, was issued on January 3, 1990. It was affirmed. J.A. 11-33.

The Louisiana Court of Appeals for the Fourth Circuit affirmed the state decision on April 4, 1991 finding *inter alia*, that (1) the Council's factual findings were supported not merely by "substantial" evidence but by a "preponderance"; (2) its order was not facially preempted; and (3) there were no due process, commerce clause or related violations; but that (4) the Council erred in moderating the remedy, so that the disallowance should be increased. *Alliance for Affordable Energy*. Within days, however, the Louisiana Supreme Court declared that a regulator could moderate a remedy as the Council did.[30] Review by that court has been sought and on July 19, 1991 it agreed to

[30] *Gulf States Utilities Co. v. LPSC*, 578 So. 2d 71 (La. 1991).

expedite its consideration of the petitions for review pending there.

SUMMARY OF ARGUMENT

Here, FERC allocated the power and cost of Grand Gulf *among* the individual operating companies, establishing their *relative* shares. It made no findings as to prudence and disclaimed authority to consider the responsibilities of the buying companies. In contrast, the Council accepted the FERC's cost allocation for purposes of retail rates, addressed the responsibility of petitioner, and found its management negligent in failing to sell off some nuclear power petitioner stood to receive, as it said it could, and thus bypassed cost savings. It left the company's relative share and the FERC's determinations unaffected. In *NOPSI III*, this Court observed that these circumstances "hardly" demonstrated manifest "facial" preemption; that, "Nothing in this is directly or even indirectly foreclosed" by federal law and that "further factual injury" was required. 491 U.S. at 367. Because there has been no further *factual* inquiry in federal court,[31] and because *NOPSI III* recognized a legitimate basis for a disallowance if *factually* supported, there is no "facial" preemption here.

Indeed, since the issue was, in the interim, decided by a Louisiana state court under a statutory regime that made that decision "conclusive" of all similar actions between the parties and required their dismissal, La. Code Civ. Proc. Ann., art. 531, the district court was bound to give preclusive effect to that decision under 28 U.S.C. § 1738, and should have dismissed the case.

The legislative history of the Federal Power Act ("FPA") shows clearly that Congress was intent upon defending state utility regulation against just the type of expansionist arguments made by the opposing parties here. It embodied in the FPA itself that FERC jurisdiction can-

[31] A review of the factual evidence in state court found the Council's determinations to be well supported. *See* p. 18, *supra*.

not extend to any matter "subject to regulation by the state," 16 U.S.C. § 824(a). The responsibility of a retail operating company with respect to power options that *are* available to it *is* clearly "subject to regulation by the state." Indeed, the FERC has declared in this *very* case and elsewhere, that it is not within FERC's jurisdictional responsibility to make such determinations, and it has *invariably* declined to do so.

There was no way that the Council could have raised the issue of petitioner's inaction at FERC, and the contention that the Council "withheld" an argument to raise it later is ludicrous. FERC could consider such a matter only in a proceeding in which a *wholesale* customer of petitioner challenged petitioner's failure to sell power, as part of FERC review of the rate that petitioner sought to charge such customer. There is not a case in FERC history in which FERC has acted otherwise. If the Council could not exercise oversight of NOPSI's management regarding its failure to explore resale opportunities, serious acts of mismanagement detailed in the factual record here, and confirmed in the state court review, would simply escape scrutiny.

The opposing parties' contention that once FERC allocates costs as "just, reasonable and nondiscretionary" they *must* be reflected without setoff in retail rates is based on the fallacy that, in the real world, FERC-allocated power, even if uneconomic, must be retained. Under such a position, even if the operating company had sold the power, the results, profitable or lossbearing, could not be reflected in retail rates; and even if the facts clearly show that the company should have sold but failed to do so, no account could be taken of it.

FERC's jurisdiction, even with respect to companies that are part of a multistate "system", has been limited to matters of *inter*company consequence—the decision to participate in a project designed for multiparty benefit; to construct and to complete it; and the *relative* allocations

of it among the companies. The decisions in *MP&L*[32] and *Nantahala*[33] are completely consistent with the Council's exercise of its jurisdiction.

Finally, there are not even any *factual* inconsistencies in the respective determinations of FERC and the Council, and in particular, FERC made no findings on "foreseeability," prudence, or other significant matters that are at odds with those of the Council. Even if there were *factual* inconsistencies, they would have to be dealt with, but they form no basis for *facial* preemption.

ARGUMENT

I. *NOPSI III* Left Virtually No Room For A "Facial" Disposition Of The Case; Moreover, It Did Not Anticipate That There Would Be Further Fractionated Consideration Of The Matter

A. The Decision In *NOPSI III*

Although the instant review concerns the same proceeding addressed in *NOPSI III*, the opposing parties advance their arguments by submerging the opinion's critical language. See Pet. Br. at 16, 35-36; S.G. Br. at 26. In NOPSI III the facial preemption claim was the very cornerstone of the opposing parties' abstention argument.[34] In response, this Court first described its holdings in *Nantahala* and in *MP&L*—much more narrowly than do the opposing briefs here, 491 U.S. at 352—and then distinguished the instant case:

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[32] *Mississippi Power & Light v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988).

[33] *Nantahala Power & Light Co. v. Thornberg*, 476 U.S. 953 (1986).

[34] Petitioner posed its "Question Presented" as whether abstention was appropriate where the FPA and FERC's "explicit orders" had "preempted local regulatory authorities from making . . . determinations of the very matters FERC has decided." (Pet. Br. at i, *NOPSI III*, No. 88-348.) The government posed the question similarly, as whether abstention was appropriate as to a claim that the local regulator "is violating federal law by refusing to honor terms fixed by" the FERC. (U.S. Br. at I, *NOPSI III*, 88-348.)

> Here the state ratemaking authority deferred to FERC's implicit finding that New Orleans Public Service, Inc.'s decision to participate in the Grand Gulf venture was reasonable, but determined that the costs incurred thereby should not be completely reimbursed because, it asserted, the utility's management was negligent in failing later to diversify its supply portfolio by selling a portion of its Grand Gulf power.

491 U.S. at 352-53.

The Court found abstention inappropriate under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), principally because "NOPSI's primary claim" that the Council "is prohibited by federal law from refusing to provide reimbursement for FERC-allocated wholesale costs" did not significantly involve state law matters.[35] Concurrently, the Court held that NOPSI's so-called "pretext" claim[36] could not be resolved on the face of the Rate Order because it turned on factual evidence. 491 U.S. at 363.

Turning next to the contention that *Younger v. Harris*, 401 U.S. 37 (1971), did not require abstention because petitioner's preemption claim was "facially conclusive" as the Rate Order was "on [its] face plainly invalid" and "flagrantly and patently" in violation of FERC's order and federal law, 491 U.S. at 367, the Court responded that such a circumstance was "hardly" present here:

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[35] "[N]o inquiry beyond the four corners of the Council's retail rate order is needed to determine whether it is facially pre-empted by FERC's allocative decree and relevant provisions of the Federal Power Act." 491 U.S. at 363.

[36] In *NOPSI III*, the Court believed that "in its initial complaint, NOPSI had asserted, as an alternative," that the Rate Order's "emphasis" on NOPSI's failure to diversify was merely a "cover for the determination that the original Grand Gulf investment was itself unwise." 491 U.S. at 393. However, NOPSI filed only one complaint, and it asserted no such claim. Rather, what petitioner now calls its "pretext" claim first appeared in a footnote in its Reply Brief here in *NOPSI III*. Petitioner later conceded that the claim had not appeared in its complaint. Tr. at 13-14, Oct. 25, 1989, No.88-559 (E.D. La.) (*see* J.A. 27).

> The Council has *not* sought directly to regulate interstate wholesale rates; *nor* has it questioned the validity of the FERC-prescribed allocation of power within the Grand Gulf system, or the FERC-prescribed wholesale rates; *nor* has it reexamined the prudence of NOPSI's agreement to participate in Grand Gulf 1 in the first place. *Rather*, the Council maintains that it has examined the prudence of NOPSI's failure, after the risks of nuclear power became apparent, to diversify its supply portfolio, and that finding that failure negligent, it has taken the *normal ratemaking step* of making NOPSI's shareholders rather than the ratepayers bear the consequences. *Nothing in this is directly or even indirectly foreclosed by the federal statute, the regulations implementing it, or the case law applying it.*

Continuing, the Court indicated that resolution of the preemption issue in this case was dependent upon further *factual* inquiry:

> There may well be reason to doubt the Council's necessary *factual* finding that NOPSI would have saved money had it diversified. See n. 2, *supra*. But we cannot conclusively say it is wrong *without further factual inquiry*—and what *requires further factual inquiry* can hardly be deemed "flagrantly" unlawful for purposes of a threshold abstention determination.

Id. (emphasis added). The Court did not suggest that there was a "facial" ground on which a finding of preemption might rest, short of examining the factual underpinnings of the Rate Order.[37]

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[37] In *NOPSI III* petitioner presented itemized lists of supposed conflicts of fact and conclusions between the FERC and the Council. (*Pet. Br., NOPSI III*, at pp. 10-12 nn.13, 16, 18.) They are virtually identical to those raised here. (*See* Pet. Br. at 37-43.)

Were the Rate Order "facially" preempted, there would be no set of facts given which the Council could find that petitioner's management had acted negligently in bypassing opportunities for off-system sales. Thus, the "facial" argument just cannot be squared with the availability of a legitimate factual basis for a disallowance specifically recognized in *NOPSI III*. Petitioner would seek an escape by suggesting that "only this Court can know what it meant in this passage" (Pet. Br. at 36). However, eight judges, state and federal, have found its meaning neither occult nor different from their independent analyses, all agreeing that there is no "facial" preemption and that this case must be determined by the underlying evidence.[38]

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[38] The Louisiana Civil District Court concluded:

> Here, the Council did not question the FERC allocation, did not question the purchase of Grand Gulf power, and did not question the interstate rate set by FERC. Instead, the Council found that NOPSI could have accepted the allocation, whatever it might be, and, nevertheless, could have achieved off-setting cost savings through off-system sales, as its president said it could.

NOPSI v. Council of the City of New Orleans, Civ. Dist. Ct. for Parish of Orleans, No. 88-4511 (Nov. 15, 1989), slip op. at 5-6. In affirming, the Louisiana Court of Appeals for the Fourth Circuit concluded, in part,

> NOPSI could accept the FERC allocations and still sell Grand Gulf power off system. NOPSI is able to pay its FERC-mandated costs under the Council rate order. . . . We find no conflict between the two orders . . . .

Alliance for Affordable Energy, Inc. v. Council of New Orleans, 578 So. 2d 949, 965 (La. Ct. App. 1991).

The federal district court determined that,

> The Council's decision did not question the validity of FERC's allocative decree, and the Council did not attempt to regulate interstate utility rates. Instead, the Council's inquiry focused solely upon whether NOPSI prudently managed its participation in Grand Gulf. Accordingly, this court concurs with the Louisiana Civil District Court by holding that the Council's Rate Order is not facially preempted by FERC's allocative decree.

NOPSI v. Council of the City of New Orleans, No. 88-559, E.D. La. Jan. 4, 1990, slip op. at 2-3, 8.

In affirming, the Fifth Circuit stated, in part,

> [The Court] said that nothing in the Council's order was directly or even indirectly foreclosed by prior preemption decisions. *NOPSI III*, 109 S.Ct. at 2517. Indeed, this seems analogous to the exception the Court called "perfectly sensible" in *Nantahala*, 476 U.S. at 968, 106 S.Ct. at 2357 . . . . If states may deny pass throughs because costs have gone down in other areas, it seems logical that they should be able to deny them because costs would have gone down if the utility had not been imprudent. We therefore hold the order is not facially preempted.

J.A. 26.

[39] The following colloquy with the government at oral argument of *NOPSI III* anticipated the current situation:

> QUESTION: [W]hat if the state court beats the federal court to the issue?
>
> COUNSEL: If the state court beat the federal court to the issue, then we might have a *res judicata* problem . . . .
>
> QUESTION: A rather severe one, wouldn't we?

Transcript of Oral Argument, No. 88-348, Apr. 25, 1989 at 24-25.

B. The District Court Should Not Have Proceeded To A Fractionated Disposition, In Light Of The Prior State Court Judgment

NOPSI III clearly anticipated that, upon remand, the district court would review the Rate Order's evidentiary support and determine both factual and facial preemption issues. However, the intervening decision on the merits by a state court of equally competent jurisdiction that embraced both the facial and factual claims (p. 18, *supra*), made it inappropriate for the federal court to go forward. The district court should have dismissed or stayed the action entirely, and not redecided the "facial" preemption issue.[39]

In *NOPSI III*, the Court noted that Congress principally defines the scope of federal jurisdiction, 491 U.S. at 359, and that the Council did not dispute the district court's

jurisdiction to proceed. *Id.* at 358. Here, in contrast, Section 1738 of Title 28 U.S.C. curtails the district court's right to proceed by requiring it to give the state judgment the "same full faith and credit" as it has "by law" in the state where it originated.

The "credit" due a Louisiana trial court judgment, whether or not on appeal, is that it is "conclusive of" all suits pending between the same parties on the same cause of action and requires their dismissal. La. Code Civ. Proc. Ann. art. 531.[40] Instead, the district court stayed proceedings after deciding the "facial" issue consistently with the state judgment. The Court of Appeals affirmed, but held that there was no Section 1738 bar because, it said, the trial court judgment was not "entitled to *res judicata* effect" under state law. J.A. 32.

The provision to which it referred, La. Civ. Code Ann. art. 3556(31) (West 1953), was a definitional provision that described "thing adjudged" as requiring the exhaustion or bypass of appeals,[41] but it did not answer the pertinent

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[40] When two or more suits are pending in a Louisiana court or courts on the same cause of action, between the same parties in the same capacities, and having the same object . . . . *the first final judgment rendered shall be conclusive of all.*

La. Code Civ. Proc. Ann. art. 531 (emphasis added) (see Appendix); *see Ramshur v. Allstate Insurance Co.*, 288 So. 2d 428 (La. Ct. App. 1973), *rev'd on other grounds, sub nom. Sauce v. Bustell*, 298 So. 2d 832 (La. 1974). A "final judgment" is one "that determines the merits in whole or in part" (La. Code Civ. Proc. Ann. art. 1841).

[41] In Louisiana case law, Article 3556 (31) was often cited for the proposition that a trial court judgment is not *res judicata* unless the appeal process is concluded—but such statements appear *only* in cases where the appeal process *was* concluded and a second action was barred. *See e.g., Ward v. Pennington*, 523 So. 2d 1286, 1290 (La. 1988); *Hospital Corp. of Am. v. Robinson*, 506 So. 2d 938 (La. Ct. App. 1987). Respondent is unaware of a Louisiana case within 50 years that has allowed a second identical cause of action to continue in the face of a prior trial court judgment.

inquiry here. Section 1738 does not require that a state judgment be "*res judicata*," but rather that it receive the same "credit" due in the originating state—here, that it is "*conclusive*" of all similar actions and requires their dismissal. Such effect was explicitly confirmed by the legislative report accompanying a recent change in the Louisiana Civil Code.[42] Thus, in accord with the majority rule, C. Wright, A. Miller & G. Cooper, 18 Federal Practice & Procedure, § 4433 at 308 (1981), Louisiana would not have permitted a second action to continue.[43]

There are further reasons for the district court to have curtailed the action entirely. Its fractionated decision unnecessarily perpetuates duplicative appellate tracks. It allows petitioner to claim that this Court *must* review the "facial" preemption issue now—piecemeal and divorced from the factual preemption issue—because, it asserts, the

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[42] A new statute, Louisiana R.S. 13:4231, became effective January 1, 1991. It provides, *inter alia*, that "a valid and final judgment is conclusive between the same parties, except on appeal or other direct review." The official comment makes clear that the *prior* law gave *preclusive* effect to a trial court judgment:

> The use of the phrase "final judgment" also means that the *preclusive* effect of a judgment attaches once a final judgment has been signed by the *trial* court and would bar any action filed thereafter unless the judgment is reversed on appeal. . . . [This] *is in accord with our present law* on lis pendens, see Code of Civil Procedure Articles 531, 532 (emphasis added).

La. R.S. Ann. 13:4231, Comment (d) (West 1991 Supp.) (emphasis added).

Below, NOPSI erroneously contended that this case was governed by La. Code Civ. Proc. Ann. art. 532, which applies only when a prior *federal* action requires the *state* to stay its hand.

[43] Even where state law does *not* give preclusive effect to a trial court judgment, the lower appellate courts have held that it is inappropriate to proceed and that any question, should be resolved in favor of curtailing conflicting proceedings. *See e.g., Ollie v. Riggin*, 848 F.2d 1016, 1017-18 (9th Cir. 1988); *Bailey v. Ness*, 733 F.2d 279, 282-83 (3d Cir. 1984); *Giulini v. Blessing*, 654 F.2d 189, 194 (2d Cir. 1981); *Glen Oaks Utilities Inc. v. City of Houston*, 280 F.2d 330, 334 (5th Cir. 1960); *Ray v. Hasley*, 214 F.2d 366, 368 (5th Cir. 1954).

federal judgment acts as *res judicata* on the *facial* issue in the state appeal process.[44] Thus, the decisions below interfere with the appellate process in the state courts. It is anomalous that a subsequent judgment in any second court should be urged as interdicting the orderly appellate review of the first. Further, if there were even a chance that this Court would find no "facial" bar, then the decision below raises the prospect of yet another review for *factual* preemption. This result is especially inappropriate because "facial" and "factual" preemption are not concepts so segregable that each should travel a separate track. *See* Transcript of Oral Argument, *NOPSI III*, No. 88-348 at 13-14, 32-33.

Both facial and factual issues are, however, being addressed in the state appellate process,[45] and review of *both* issues by this Court will shortly be possible.[46]

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[44] Notably, NOPSI did not claim that the federal *district* court's decision on facial preemption had a *res judicata* effect in the state proceeding, and so it briefed its "facial" position in its state court appeal. After the Fifth Circuit ruled against NOPSI, and review by this Court was contemplated, NOPSI abandoned the facial issue in oral argument before the Louisiana Court of Appeals. That court decided the facial issue independently and also ruled that it had been determined in federal court. *Alliance for Affordable Energy*, 578 So. 2d at 965-66. Petitioner now raises this reverse *res judicata* argument as a basis for this Court's acting. Pet. Br. at 20 and n.23.

[45] To date, petitioner has succeeded in frustrating the intent of Congress manifested in the Johnson Act, 28 U.S.C. § 1342, that federal constitutional challenges to state utility regulatory orders proceed only through the state courts to this Court, *viz*:

> [A utility] will be required . . . to proceed before that commission if it has any complaint. It can appeal from this State board to the State courts; and if it is dissatisfied . . . it can take an appeal to the Supreme Court of the United States. . . . It is fair to all parties concerned. It would save a large amount of time and money.

78 Cong. Rec. 2038 (1934) (Report of the Senate Judiciary Committee).

[46] There is *no* urgency whatever in this matter. NOPSI has been operating satisfactorily for years under the current rate schedule, and its current financial statements indicate that it will continue to do so. Form 10-Q, May 13, 1991, at 67 (filed for petitioner and its affiliates)—just as the Council's factual determinations anticipated. J.A. 242-243.

II. The Council Acted Properly On A Matter Within Its Lawful Jurisdiction, And The FERC May Not Expand Its Authority To Encroach Upon That Jurisdiction

A. The Legislative History Of The Federal Power Act Explicitly Contradicts Petitioner's Position

Omitted entirely from the government's brief and misportrayed in petitioner's, the legislative history is clear that Congress enacted the FPA to address only a "regulatory gap" while taking care to *protect* state regulatory jurisdiction from federal encroachment—without any purpose to address "uncontrolled" state regulation (Pet. Br. at 23), or to curtail "multiple" (*i.e.*, "state") proceedings. (*Id.*)

Before enactment of the FPA, only the states regulated the practices of utilities. There was no federal agency to deal with *inter*state matters. The foreclosure of the states from the latter by the Commerce Clause resulted in a "regulatory gap"—the absence of any *inter*state regulation—a result that flowed from the jurisdictional "bright line" between federal and state jurisdiction drawn by the Court in *Attleboro*.[47] In response, Congress created the Federal Power Commission ("FPC," now FERC) with authority to set interstate wholesale rates and thus to fill this "gap," but it did so with deliberate care not to detract whatever from the power of the states. *Federal Power Comm'n v. Southern Cal. Edison Co.*, 376 U.S. 205, 211 (1964). According to contemporaneous testimony by the FPC, "[t]he [Act] simply fills this gap and *that is all.*" *Public Utility Holding Companies: Hearings on H.R. 5423 Before the House Comm. on Interstate and Foreign Commerce*, 74th Cong., 1st Sess. 549 (1935) (emphasis added).

Thus, the statute itself, Section 201 of the Act, 16 U.S.C. § 824, describes the matters as to which the FERC may

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[47] *Public Util. Comm. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927).

act but adds, "such Federal regulation, however, to extend *only* to those matters which are *not subject to regulation by the States*"; and it further denies FERC jurisdiction "over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." 16 U.S.C. § 824(a) and (b)(1) (underscore added).

The legislative history is unusually explicit. The Senate Report explained that the final bill:

> *removed every encroachment upon the authority of the States.* The revised bill would impose Federal regulation *only* over those *matters which cannot effectively be controlled by the States.* The *limitation* on the Federal Power Commission's jurisdiction in this regard has been inserted in *each* section in an effort to *prevent* the expansion of Federal authority over State matters.

S. Rep. No. 621, 74th Cong., 1st Sess. 18 (1935) (emphasis added). The purpose was "not to impair or diminish the powers of any State commission." *Id.* at 48. The House Report was equally emphatic:

> The new parts are so drawn as to be a complement to . . . State regulatory authority . . . . Probably, *no bill in recent years has so recognized the responsibilities of State regulatory commissions as does Title II of this bill* [the FPA].

H.R. Rep. No. 1318, 74th Cong., 1st Sess. 8 (1935). The Act was "directed to the purpose of supplementing and assisting and not encroaching upon State regulation or the sovereign powers of the States." *Public Utility Holding Company Act of 1935: Hearings on S. 1725 Before the Senate Committee on Interstate Commerce*, 74th Cong., 1st Sess. 249 (1935). As the Court stated,

> The Act . . . had *no* purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to *aid in making state regulation effective* . . . .

Panhandle Eastern Pipeline Co. v. Public Serv. Comm'n of Indiana, 332 U.S. 507, 517 (1947) (emphasis added).[48] Congress was "meticulous to take in only territory which this Court had held the states could not reach." *Id.* at 519.

Contemporaneously, the Public Utility Holding Company Act ("PUHCA"), 15 U.S.C. §§ 79-79z-6, was passed in part to insure that individual companies that were part of a *multistate* utility holding company were made *more* responsive to local interests and regulation[49] and that the holding companies not be so large as to impair the advantages of "localized management . . . and the effectiveness of regulation." 15 U.S.C. § 79b(a)(29).

At the same time, Congress passed the Johnson Act, 28 U.S.C. § 1342, declaring that disputes over utility retail rates based on federal constitutional challenges should be adjudicated in state courts. The purpose was to "limit the authority of the public utility corporations to . . . impede the states in their regulatory actions." (Testimony of Sen. Hiram W. Johnson, sponsor of the Act, 78 Cong. Rec. 8335 (1934)). See n.45 *supra*.

There is not the slightest indication that rights were given to the states to participate in FPC (FERC) proceedings so that FERC could act as a "single neutral federal forum" for a dispute between a state regulator and its jurisdictional utility (much less, as to a matter involving

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[48] The "Act" referred to in *Panhandle* was the Natural Gas Act, but it is "established practice" to cite decisions interpreting the FPA or NGA "interchangeably." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

[49] The accompanying Senate Report stated,

> An operating system whose management is confined in its interest, its energies, and its profits to the needs, the problems, and the service of one regional community is likely to serve that community better, to confine itself to the operating business, to be amenable to local regulation . . . and responsible to the fair demands of the public . . . .

S. Rep. No 621, 74th Cong., 1st Sess. 12 (1935).

its local management) as opposed to acting neutrally between different jurisdictions. (Compare Pet. Br. at 24.)

The statutory scheme directly affects how the claim of preemption here must be resolved. State action is deemed preempted when Congress has expressed a clear intent (a) to preempt state law, *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), or (b) to "occupy the field" and leave no room for state law. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Otherwise, state action is preempted only to the extent that it (c) *actually* conflicts with federal law, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or (d) "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Since Congress did not intend to preempt state regulation, but to preserve it and limit federal encroachment, it is necessary to conduct a careful "conflict-preemption analysis," which

> must be applied sensitively in this area, so as to prevent the diminution of the role Congress reserved to the States while at the same preserving the federal role.

See Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 515 (1989). Moreover, where, as here, the states' police powers are implicated, 491 U.S. at 365, the Court "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest purpose* of Congress." *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991). (emphasis added). There is no basis upon which FERC can be said to have had the authority to (much less have taken action to) displace the Council categorically here from examining a legitimate matter of local regulatory concern.

B. There Is No Substantive Or Jurisdictional Conflict Between The Council's And FERC's Actions

1. The Council's Order Properly Addressed Matters Within Its Jurisdiction

The Rate Order sets only retail rates, accepts FERC's allocation of costs, recognizes that they must be reflected in retail rates and imposes a disallowance only by reason of management's negligence and consequent failure to realize offsetting revenues in other transactions. J.A. 72, 201. It avoids even indirect financial impact on petitioner's obligations. *See* J.A. 242-43. Nor are petitioner's costs passed to ratepayers in other states.[50] Rather, the Order requires, as a "normal ratemaking step," that the utility investors take appropriate responsibility for imprudent management. 491 U.S. at 367. There is no Congressional purpose to insulate such investors from the consequences of mismanagement at the retail level.

2. The FERC Did Not and Could Not Address the Issues Addressed By The Council

The issue before FERC was the fair *allocation* of the costs of Grand Gulf *among* the companies that sponsored the project, 31 FERC at 61,632; 32 FERC at 61,943. The result was a "just, reasonable and non-discriminatory" wholesale power rate. The opposing parties, however, try to shift the meaning of this phrase—that the underlying costs were properly incurred and that the allocation formula is fair—to one of asserting that this "fair" share of a potentially uneconomic (ultimately, "catastrophically uneconomic") plant was, in actuality, good for a company and its ratepayers. See S.G. Br. at 5, 14. The underlying fallacy is the notion that power *must* be retained if allocated by FERC. They contend that it is *proper* for petitioner's man-

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[50] The complaint does not allege that petitioner's costs were passed on to other companies. Also, petitioner's president testified that Grand Gulf cost absorptions by the *other* operating companies did not shift any costs to NOPSI and that effects were confined to each company. J.A. 99.

agement to act negligently and retain power—even if, *in fact*, there were legitimate cost concerns and management had resale alternatives—but *improper* for management to take action to address such problems by, say, the very sales that petitioner's management testified it could make.[51]

Of course, FERC here had no actual or even arguable concern with such issues. Rather, FERC deemed local factors *irrelevant* to the issue of allocating the plant costs fairly among the several companies, 487 U.S. at 376. Further, an inquiry into the prudence of the management of a buying company regarding its risk-reduction options was not even within the FERC's own view of its jurisdiction and "not generally within the scope of issues considered in reviewing the rates and terms for the jurisdictional sale of power." (*See* n.14 *supra*.) FERC has never evinced any interest in whether petitioner might resell part of its Grand Gulf power, but only that it accept responsibility for a fair portion relative to the other companies.

The issue of NOPSI's *failure* to seek off-system sales could not have been raised at the FERC at all (much less for the purpose of setting a *retail* rate, the only matter involved here). The FERC has power only to approve the rate (and terms) of an interstate transaction *actually filed* with it for approval, 16 U.S.C. § 824e. (Contrast Section 7 of the Natural Gas Act, 15 U.S.C. § 717f (1982), granting FERC certification authority.) Further, it confines this review to the components of the rate itself, *i.e.*, to the *seller's* cost factors and practices. *Monongahela Power Co.*, 39 FERC ¶ 61,350, at 62,095 (1987). Here, where the problem is that a retail utility *failed* to engage in a transaction, there is *no* rate to file at FERC to invoke its jurisdiction—much less to stimulate a wholly *unprecedented* FERC inquiry into the prudence of the *buying* utility's resale practices. As a result, if no state review were possible, the

[51] The same fallacy (and others) underlies the supposed impossibility of coexistence of certain propositions propounded in the government's brief (S.G. Br. at 20).

utility here would escape regulation entirely and frustrate Congress' purpose to close the regulatory "gap."

Indeed, the only situation in which the prudence of petitioner's *not* making off-system sales could, in theory, have properly been raised before FERC would have been in a proceeding where a hypothetical *wholesale customer* of NOPSI, whose rate was based on NOPSI's Grand Gulf costs, contended that that rate was too high, by reason of NOPSI's failure to sell-off Grand Gulf power. Here, there was never such a complaint filed and thus no basis on which FERC could acquire jurisdiction to consider the matter. This situation would, moreover, provide no way for the Council to raise the matter.[52] *Cf. Monongahela Power Co.*, 39 FERC at 62,096.

The government attempts to confect a basis for FERC jurisdiction by the expedient of *altering* the subject matter of the prudence inquiry. Thus, it contends that an assertion that "Grand Gulf costs should have been disallowed . . . because the *project* . . . should have been sold off-system" could have been raised before FERC (S.G. Br. at 18) (emphasis added); and that the Council "could have argued, for instance, that it was imprudent for *MSE* to have failed to sell more than 10% of Grand Gulf off-system" (S.G. Br. at 19, n.10 (emphasis added). These contentions are irrelevant. The Council's inquiry involved the actions of NOPSI, not of MSE. Further, the Council did not determine whether the "system" should have sold either the "project" or additional power because such a determination is beyond its jurisdiction and involves other factual considerations. Similarly, the Council expressed no view as to whether—for overall "system" planning or fuel mix—the amount of Grand Gulf power retained by the "system" was appropriate. The jurisdiction of FERC to decide one issue can

[52] In oral argument in *MP&L*, Mississippi's Attorney General was asked whether, "[A]ll of the arguments that Mississippi wished to present now with reference to prudence could have been made before FERC," and agreed that they could have been. (Transcript at 36-37, No. 86-1970, Feb. 27, 1988.) The Council's situation is entirely different.

hardly be established by pointing to its jurisdiction to decide a different issue involving a different entity's prudence.[53]

Further, the opposing briefs posit FERC jurisdiction because they say, FERC determines prudence as to "*any and all* claims that a utility behaved imprudently after construction of the plant was 'underway' " (Pet. Br. at 26) and has "considered claims that it was imprudent for *a utility* to fail to sell off nuclear power while construction of the plant was underway"[54] (S.G. Br. at 18, n.9, emphasis added) citing, in particular, *Connecticut Power & Light Co.*, 43 FERC ¶ 63,029 (1988), *aff'd* 48 FERC ¶ 61,139 (1989). Such contentions are inaccurate and phrased so as to hide the key distinction that FERC has considered *only* the prudence of the *seller* of power when the seller files a wholesale rate for approval—just as described in the hypothetical case stated at p. 35 *supra*. In the *Connecticut Power* case, for example, FERC considered the contention that the *seller* of power from a nuclear plant should have sold off its entitlements to lower the overall costs to certain customers. (The analogy would be that MSE should have sold off additional Grand Gulf power to reduce its aggregate costs; but this is not the issue here.)

None of the cases cited in the opposing briefs on this issue has bearing here, because all involve FERC deter-

[53] For the same reason, the government's contention that NOPSI's prudence could have been placed in issue so as to "reduce NOPSI's *relative* share" of the allocation is irrelevant. (S.G. Br. at 19 n.10, emphasis added.) There is no nexus between the fairness of NOPSI's relative allocation of power and NOPSI's failure to resell power.

[54] The coincidental use of the word "underway" by both opposing parties is a play on language in the Fifth Circuit's decision below. The Fifth Circuit posed the question whether FERC had jurisdiction to determine "whether NOPSI acted prudently once the Grand Gulf project was underway." J.A. 25. However, the word "underway" referred to the time of the events, and not to the basis for the Court's decision. The Court found that the Council could inquire into the issue of reducing costs through other means, J.A. 26, and such means were off-setting sales. J.A. 39.

minations, in setting a wholesale rate, whether a *seller* properly completed or abandoned construction of a particular plant (or part thereof)[55] or whether the initial agreement among companies to participate was proper.[56] These decisions have nothing to do with whether a *buyer*—such as petitioner—had the opportunity to sell a portion elsewhere but negligently bypassed it, with consequent impact on its retail rate. The opposing briefs have cited *not a single case* in FERC's history in which FERC has undertaken to determine whether a *buyer* of wholesale power should have engaged in offsetting transactions or addressed the attendant consequences. The FERC has consistently declared such matters to be beyond its statutory responsibility.

It did so here. MSE submitted a proposed finding that the "purchases by LP&L, MP&L and NOPSI of their respective allocations . . . are prudent and will . . . move each company toward having its proportionate share of base (coal and nuclear) generation." Initial Brief of MSE at 154 (July 3, 1983), Proposed Finding No. 21, *Middle South Energy Inc.*, No. ER82-616. The finding was opposed by FERC

[55] *See New England Power Co.*, 8 FERC ¶ 61,054 (1979) (plant cancellation), *aff'd sub nom., NEPCO Municipal Rate Committee v. FERC*, 668 F.2d 1327 (D.C. Cir. 1981), *cert. denied*, 457 U.S. 1117 (1982); *Southern California Edison Co.*, 8 FERC ¶ 61,198 (1979) (plant cancellation), *aff'd sub nom., Anaheim, Riverside v. FERC*, 669 F.2d 799 (D.C. Cir. 1981); *Minnesota Power & Light Co.*, 11 FERC ¶ 61,312 (1980) (retirement of pollution control device); *Northern States Power Co.*, 17 FERC ¶ 61,196 (1981) (plant cancellation), *aff'd sub nom., South Dakota Public Utilities Comm'n v. FERC*, 690 F.2d 674 (8th Cir. 1982); *Arizona Public Service Company*, 27 FERC ¶ 61,185, at 61,351 (1984); *Arizona Public Service Company*, 23 FERC ¶ 61,419 (1983), *summarily aff'g*, 21 FERC ¶ 63,007 (1982) (continued construction); *New England Power Co.*, 32 FERC ¶ 61,112 (1985) (plant cancellation), *aff'd subnom., Violet v. FERC*, 800 F.2d 280 (1st Cir. 1986); *Union Electric Co.*, 40 FERC ¶ 61,046 (1987) (plant construction); *New England Power Co.*, 42 FERC ¶ 61,016 (1988) (plant cancellation). *See also Regulation of Electricity Sales-For-Resale and Transmission Service*, FERC Statutes and Regulation, ¶ 35,519 (1985).

[56] *New England Power Co.*, 32 FERC ¶ 61,112 (1985), *aff'd sub nom., Violet v. FERC*, 800 F.2d 280 (1st Cir. 1986).

Staff on the basis that: "The Commission has repeatedly stated that it does not view its responsibility under the Federal Power Act as including a determination that a purchaser selling at retail has purchased wisely or made the best deal available, i.e., the prudence of a purchase." Reply Brief of Commission Staff at 36, ER82-616 (Aug. 10, 1983). It was not adopted.

Apart from misstating the prudence issue, the government appears to argue that the Court should endow FERC with a new ancillary jurisdiction that it might exercise as a prophylaxis against state regulatory misbehavior. In addition to the lack of merit in such a course, it is simply precluded by the jurisdictional limits imposed by Congress, which do not presume a need for FERC to invade state regulation, but rather a need to protect state regulation from FERC invasion. The government's position would clearly require a legislative turnabout.

3. The FERC's New "Jurisdictional" Position Would Encroach Upon State Regulatory Rights

Because the determination by the Council was within its jurisdiction, it is not surprising that it does not, in any way, "undercut" or "nullify" the FERC's order. Petitioner can comply with the Council's Order as well as with FERC's. The opposing arguments would instead radically undermine state prerogatives, with inappropriate results.

The government argues that "any order" that does not allow a utility to recover the cost of power that FERC had required it to buy "necessarily undercuts FERC's determination" that the "terms are just and reasonable" (S.G. Br. at 12), and that the order is precluded because it would "prevent NOPSI from recovering the very costs that FERC has determined are just and reasonable" (S.G. Br. at 14). These arguments shift the meaning of "just and reasonable." *See* pp. 33-34, *supra*. They are in irreconcilable conflict with the language of *NOPSI III*. 491 U.S. at 367. Further, they lead to the result that if NOPSI had sold part of its Grand Gulf power, in any manner, the FERC-allocated costs would *still* have to be reflected in retail

rates, without offset from the sale proceeds, because once the FERC had allocated the "just and reasonable costs," they *must* appear in retail rates. Similarly, if the evidence showed that NOPSI's management had an opportunity to sell power, but declined to do so (say, because it was cooperating in a scheme to downplay problems at Grand Gulf), the retail regulator could not take that into account.

The related contention that a rate order is "facially" preempted if it "traps" any portion of FERC-mandated costs "on the ground that it was imprudent for NOPSI to incur them" (S.G. Br. at 11) is purposefully ambiguous as to whether it refers to the initial imposition of power costs or the decision by management not to pursue options to reduce costs. This Court has used the term "trapping" to describe *only* a local regulator's refusal to recognize FERC-allocated costs based on its attempt to decide a matter within FERC's jurisdiction, and *not* to describe any offsets, penalties or deductions for improper acts by the utility's management properly within the purview of the local regulator.[57] There cannot be an improper "trapping" of costs when a regulator offsets the proceeds of sales that have been, or should have been, made.[58]

The opposing arguments would simply license negligent management to do nothing to protect its ratepayers from undue risks as to any allocation of power approved by FERC, even if the *facts* show that it should have done so. To detract from this, the government contends that the states will misbehave—that, if the Council can undertake this inquiry, so could all other "interested retail ratemakers," with the "upshot" that the states could "respond"

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[57] In another case, FERC is currently arguing that the "principle of impermissible trapping is a very *narrow* rule" arising "only" where "state and federal agencies regulat[e] *precisely the same subject matter*." FERC Br. at 14 (May 24, 1991), *Ohio Power Co. v. FERC*, No. 88-1293 (D.C. Cir.) (emphasis added).

[58] State regulators have exclusive jurisdiction to determine how retail rates should be adjusted to account for revenues obtained through off-system wholesale sales. *Public Service Co. of Indiana*, 51 FERC ¶ 61,367, at 62,213-214 (1990).

by refusing to pass on FERC-allocated costs because of off-system sale opportunities (S.G. Br. at 22). Identically, NOPSI asserts that it is "always possible" for the retail regulator "to make (or contrive) a finding that a prudent utility should have minimized" its exposure by off-system sales. (Pet. Br. at 43.) These arguments would deny state regulators power to investigate matters within their jurisdiction based on the cynical premise that states will "respond" without, or will "contrive," evidence of mismanagement in order to evade FERC costs. They are a direct attack on the Congressional allocation of retail oversight to the states. Further, they assume erroneously that the "contrived" responses of state regulators will remain undisciplined by judicial review—by means of the very *factual* inquiry that the opposing parties seek to prevent here. Allowing state inquiries to go forward permits the *inquiry* to take place, but it does not authorize an improper deduction to stand.

Here, the Council found that the economics of Grand Gulf I had become problematical during the 1979-80 period; and that petitioner, facing a large commitment, should have taken steps to diversify by seeking off-system sales. Although the possibility of power sales was much on management's mind, it did nothing.[59] J.A. 141-43.

The availability of retail level review will promote different behavior—like that of Public Service of New Mexico

[59] The Council's findings, well-based in the evidence, relied on expert testimony; testimony by petitioner's president and its senior vice president that the power was marketable; a history of off-system power sales by the operating companies; that off-system sales of the power were later attempted, but too late; that the system agreements had been amended to facilitate off-system sales; and other factors. J.A. 197-203; *Alliance for Affordable Energy*, 578 So. 2d at 962-64. Petitioner adverts to the district court's belief, expressed in an earlier opinion, *before* it had the factual record, that the Rate Order rested upon NOPSI's finding a "sucker" to buy power (Pet. Br. at 39, 44); but, with deference, this was factually incorrect (J.A. 202) as was the court's belief that the disallowance was the same as had been sought at FERC. J.A. 242. Notably, the district court made no similar observations here, *after* it had the factual record.

("PSNM") with respect to its participation in the Palo Verde nuclear plant during 1979 when it,

> took several steps to manage the effects on its generating capacity of external events . . . [including] a series of strategies . . . attempts to reduce PSNM's share of Palo Verde by selling ownership, selling portions of the coal-fired San Juan plant and leveling Palo Verde's cost through sales-leaseback transactions . . . .[60]

The Council required that petitioner be accountable to the ratepayers, exercise diligence with respect to its power commitments, and manage its risks through available alternatives. Had petitioner done so, it would not have undercut *any* obligation established by the "system" or FERC, and would have remained responsible for its share of costs and had offsetting revenues. J.A. 201. (The effect at the time would have been to spread the risks of Grand Gulf—prospective future benefits as well as losses—more widely.) But petitioner did nothing.

4. The *MP&L* And *Nantahala* Decisions Do Not Foreclose The Council's Actions

If the Council's disallowance of retail rates to reflect on NOPSI's negligence in bypassing cost-reducing options were "facially" barred by *MP&L* or *Nantahala*, then it would hardly have been possible for the Court in *NOPSI III* to say that, "Nothing in this is directly or even indirectly foreclosed" by federal law. 491 U.S. at 367.

In *Nantahala*, FERC determined the allocation of electricity costs between two utilities located in different states. North Carolina, however, "expressly rejected the fairness" of FERC's allocation, 476 U.S. at 961, and, in setting retail rates, "chose an allocation . . . that differ[ed] from" the FERC's. 476 U.S. at 955. The Court held that, under the "filed rate doctrine," the "NCUC's allocation" is preempted." 476 U.S. at 955; and that the state order had

[60] *Electric Utility Week*, Feb. 6, 1989 at 13 (summarizing testimony).

thus "trapped" costs in finding "Nantahala should have obtained more of the low-cost" power than allocated by FERC and setting retail rates on that basis. *Id.* at 968; 971-72.

The Court made clear that retail considerations, including the recognition of savings, could properly be taken into account, and did not suggest that their offset against costs would constitute impermissible "trapping." *Id.* at 967-68. Further, the Court distinguished the "*Pike County*[61] line" of cases on the basis of the *choiceless* nature of the utility's situation, noting that "no source of power besides entitlement and purchased power from TVA is said to be available" (*id.* at 973). Here, in contrast, the Council accepted both the price and quantity set by FERC, but focused on available choices—off-setting transactions—that both NOPSI's management and expert witnesses stated NOPSI could have pursued. J.A. 201.

MP&L presented the narrow question, "[W]hether the FERC proceedings have preempted" the state's inquiry into "the prudence of the management decisions that *led to the construction and completion* of Grand Gulf 1." *MP&L*, 487 U.S. at 356 (emphasis added).[62] The state supreme court had identified certain "prudence" issues to be addressed, each plainly committed to FERC's exclusive jurisdiction, *viz*: (1) whether Grand Gulf power was "not needed" and

[61] *Pike County Light & Power Co. v. Pennsylvania Pub. Util. Comm'n*, 465 A.2d 735 (1983) and the FERC's decisions hold that where a utility has choices among power sources, the fact that the FERC has prescribed a "just and reasonable rate" for one source does not mean that the utility can ignore the availability in fact of lower-cost power.

[62] In *MP&L*, the Court referred to ALJ Liebman's statement that "continuing *construction* of Grand Gulf Unit 1 was prudent" because management "believed" that Grand Gulf would result in lower costs than "existing alternatives on the system." *Id.* at 363 (quoting 26 FERC at 65,112) (emphasis added). NOPSI reorders the ALJ's words and inserts its own time frame, stating that the Council's order conflicts with a FERC "finding" that MSU "prudently" believed "in 1980" that Grand Gulf would cost "less than existing alternatives." Pet. Br. at 22. This is incorrect. The statement did not say either that the time-point was 1980; or that MSE's management "prudently" believed. As indicated *infra* at 46-47, it was no "prudence" finding at all.

had been set "at a price that is not prudent," 487 U.S. at 367; (2) "whether MP&L, [MSE] and MSU acted reasonably when they constructed Grand Gulf 1," *id.* at 368; (3) "whether the completion of Grand Gulf, or its continued operation, was prudent," *id.* at 368; (4) whether the "transactions *between* MP&L, [MSE], and MSU" were reasonable, *id.* at 376 (emphasis added); and (5) whether retail rates could be set on the "assumption that MP&L is obligated to purchase less Grand Gulf power than FERC has ordered it to purchase." *Id.* at 373. These matters implicated the "overall interests of the affiliated group rather than the particular interest of the individual affiliate." 487 U.S. at 382 (Scalia, J., concurring). The state "failed to raise" these issues before FERC, which "easily could have considered [them] in determining whether to permit *MSE* to recoup 100%" of its costs. *Id.* at 375 (emphasis added).[63]

In contrast, the Council (1) did not question the decision to construct or complete Grand Gulf or NOPSI's participation in it; (2) did not question the price; and (3) accepted the FERC's allocation. The Council reached its decision based on substantial evidence that management should have sold power—evidence without counterpart in *MP&L*.[64]

5. There Are No Substantive Conflicts Between The Decisions of The Council And FERC

In *NOPSI III*, petitioner also advanced a list of alleged conflicts between the FERC's and the Council's findings

[63] NOPSI speculates what the Mississippi PSC "would have addressed" had its prudence inquiry proceeded, seeking to assimilate it to the Council's proceeding (NOPSI Br. at 32). Of course, none of these matters was mentioned by the state court or by this Court in *MP&L*, and NOPSI provides no support for its view.

[64] NOPSI refers to the Council's arguments as *amicus* in the *MP&L* case (NOPSI Br. at 31 n.39), but it ignores that the key position of the Council in its *amicus* brief was that *MP&L* not be decided in a broad way that would undercut the Council's prudence proceedings, which were different from those contemplated in Mississippi. The *MP&L* result was consistent with that position.

as a basis for "facial" preemption, *see* n.37 *supra*, but the Court did not mention them or suggest that alleged *factual* conflicts were to be dealt with as a *facial* issue. Even if there were such differences between the findings of the Council and the FERC, it would not mean that the Council's Order was "facially" preempted, but, at most, that the Council might be bound by certain findings, although the matter is not clear nor at issue here.[65] There are, however, no conflicts between the FERC's determinations and those of the Council, but only between the opposing parties' misportrayals of each.

As an overview, the opposing parties largely confuse two different levels of concern, *viz*: (1) decisions to participate in, construct and complete the plant; and (2) an individual company's options while the plant goes forward or is completed. An example will clarify: Assume that NOPSI had been one of several companies that had agreed to finance construction, not of a nuclear plant, but of a large building, by guaranteeing to take a portion of its space, and that based on this, the building's owner, SERI, obtained financing. During construction, costs increased, and the economic desirability of the space became problematic. As the building reached, say, 70 percent completion, a decision had to be made whether (a) to curtail construction and leave it a partially completed shell, or (b) to complete it with the expectation that it would be usable and might be economic.

The first set of issues—whether to invest initially and later to complete—are obviously different both in nature and timing from the issue of how NOPSI should act with regard to *its* obligation to take and pay for space. Clearly, neither the building's completion nor NOPSI's commitment

[65] The court below suggested in *dictum* that if there were factual conflicts, which it found not to be the case, "the Council would have been bound by FERC's resolution of those issues." JA-25 n.5. However, FERC considers that a state commission and the FERC may make independent factual findings on matters within their respective jurisdictions even if they do conflict. *Monongahela Power Co.*, 39 FERC ¶ 61,350, at 62,096 (1987).

to pay for space would prevent NOPSI's subleasing to others. By entering into contracts to sublet, for example, NOPSI would remain liable for payments—but would receive offsetting revenues. The nature of the problem remains the same whether the amount of NOPSI's space commitment[66] was fixed by a contract, allocated by a formula, or set by a federal commission.

Thus, management's obligation to *retail ratepayers* to evaluate risks and pursue available options is not the same issue as management's obligation to *the system* for a share of the plant. Further, the computations underlying these issues are themselves different (n.11 *supra*).

Turning to the specific alleged conflicts, the Rate Order does not "effectively reallocate" Grand Gulf costs among the companies (compare S.G. Br. at 23). The Council made no reallocation or any finding as to how much Grand Gulf power MSE should hold or sell but rather confined its determinations to NOPSI's situation. Thus, the Council's findings did not affect the *relative* cost responsibilities *among* the operating companies (*compare* S.G. Br. at 16, 19)—just as the disparate settlements reached with the MSU operating companies, involving cost absorptions, did not shift their Grand Gulf costs *relative* to petitioner. J.A. 98-99.

Second, the disallowance is not inconsistent with FERC's findings regarding either the system's diversification or continued construction of Grand Gulf (compare S.G. Br. at 24). Neither circumstance required that NOPSI's management avoid the usual practice of adjusting its power and fuel mix needs to meet its own public service responsibility. The facts show that the companies were not only free to do, they were expected and obligated to do so. *See* pp. 4-5 *supra*; 31 FERC at 61,656; 32 FERC at 61,957.

Third, ALJ Liebman's statement that "continuing construction of Grand Gulf Unit No. 1 was prudent because

[66] The same analogy used here could be developed using, say, an obligation to take a quantity of raw materials or the output of a manufacturing plant.

Middle South executives believed Grand Gulf would enable the Middle South system to diversify . . . and, it was projected at the same time, produce power for a total cost . . . less than existing alternatives on the system" (26 FERC at 65,112-65,113) is not in conflict with any of the Council's determinations and was not a finding on any legal issue of "prudence."[67] Further, it addressed only the *continuing construction* of Grand Gulf, not whether NOPSI should *retain* power it stood to receive. Moreover, the statement addressed only a comparison between Grand Gulf and "existing alternatives *on the system*"—not all relevant power alternatives. Coal power was not "on the system" until 1980 when Grand Gulf was more than 70% complete.[68]

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[67] Exploring the alleged basis of the FERC's "finding" on prudence, asserted by petitioner, demonstrates that it is inappropriate to attribute to FERC "determinations" of matters not even before it, *see* n.12 *supra* much less actually addressed by it. ALJ Liebman's language was neither directed to any *issue* of, nor phrased to reflect the legal standard of, prudence. Rather, it was a response *only* to New Orleans' argument that the FERC was obligated to use a "peak responsibility" allocation method because Grand Gulf had been initiated on the basis of a "load growth" justification. 26 FERC at 65,112. ALJ Liebman answered that the justification changed to one of "fuel diversification and fuel replacement" and stated that MSU executives "*believed*" that Grand Gulf would enable the system to diversify and produce power for a total cost less than "*existing alternatives* on the system." *Id.* at 65,112-65,113 (emphasis added). The legal test of "prudence," however, is *not* met by "beliefs," but rather by whether they were objectively reasonable in the circumstances, *see* J.A. 90-94—a matter not explored in the FERC proceeding. Also, as indicated in accompanying text and the next footnote, other necessary prudence factors were simply not included. FERC itself never addressed any of this, but merely generally accepted ALJ Liebman's findings as they related to the choice of allocation method. 31 FERC at 61,666. In *MP&L*, the Court noted that the FERC had not discussed prudence but had "implicitly accepted the uncontroverted testimony of the MSU executives" as to why they continued to construct Grand Gulf and had "approved the finding" made by ALJ Liebman in the context noted above—*not* that the FERC had in fact made a finding on prudence. 487 U.S. at 363.

[68] ALJ Liebman adverted only to "existing alternatives on the system," 26 FERC at 65,112-65,113, gas and oil fired. (See 26 FERC at 65,101.) He had made the *same* point earlier:

> *In the 1970's* with the reduced load growth forecasts on the Middle South system, it became evident that Middle South no longer needed the capacity. . . . However, based on its projections for the cost of Grand Gulf and the increasing price of oil, Middle South anticipated that, even though it would have excess system capacity with the addition of Grand Gulf, the average overall cost per kilowatt-hour of electricity would be less than it would be if the system *continued to rely upon oil- and gas-fired generation.*

26 FERC at 65,102 (emphasis added). Yet the coal power issue was critical to prudence determinations. *See J.A.* 170, 188, 194.

There is no reference to *when* Middle South executives held such belief or *when* the projections held true; yet, the timing of such events are critical in prudence determinations. These were unaddressed by FERC—except in marginalia that *support* the Council's determinations. (*See* p. 7, *supra*..)

While petitioner states that the Council's findings were made by reviewing "the *same* evidence of the MSU's system's Grand Gulf decisionmaking" that was before the FERC (*id.*), but FERC's findings on such evidence do not conflict with the Rate Order, and virtually none of the key evidence developed at the Council (regarding, *e.g.*, the alternatives available to NOPSI, lack of restraint on resales, the time when Grand Gulf power appeared potentially uneconomic, the relative costs and availability of power, the acts and omissions of NOPSI's management, and more) was before FERC—for the very reason no prudence issue of any kind was addressed there.

Fourth, the government's contention that it was inappropriate for the Council to assume that NOPSI's resales of power for its own account would *not* be recaptured by FERC and redistributed to other companies (notwithstanding that NOPSI had satisfied the entirety of the obligation FERC assigned to it) is not only unreasonable and unsupported by any FERC precedent (none of which suggests any FERC interest in, or power to, reattribute such sales), it is contrary to Opinion 234 itself. The FERC determined

that NOPSI's "just, reasonable and non-discriminatory" allocation of Grand Gulf was 17%, no more or no less. The government's argument rests on the impermissible assumption that the FERC might have taken a different action see *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981)—that is, one effectively requiring NOPSI to have taken even a larger share of Grand Gulf and becoming responsible not only for the power allocated to it—some held, and some sold-off—but yet more power as well. The entire argument is so speculative and beyond the range of existing FERC precedent that it deserves no weight.

Finally, petitioner's contention that the Council's findings are "preempted" because the system agreement required "system-wide planning and foreclosed individual MSU operating companies from engaging" in off-system transactions (Pet. Br. at 40) is just a quarrel with the facts. System-wide planning for overall fuel mix and capacity was never deemed inconsistent with the companies taking individual actions to achieve a mix of power sources. J.A. 119-120; 31 FERC at 61,656; 32 FERC at 61,957. Moreover, the contention that the other companies would have frustrated NOPSI's off-system sale was raised during the hearings and fell apart during cross-examination. J.A. 200.

CONCLUSION

For the reasons stated, the Court should either (1) affirm the decision below or (2) reverse with the direction that the district court's judgment should be vacated and the action dismissed in light of the prior state court judgment.

Respectfully submitted,

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September 6, 1991

APPENDIX

APPENDIX

STATUTES

28 U.S.C. § 1738:

* * * *

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947

La. Code Civ. Proc. Ann. art. 531 (West 1960):[1]

When two or more suits are pending in a Louisiana court or courts on the same cause of action, between the same parties in the same capacities, and having the same object, the defendant may have all but the first suit dismissed by excepting thereto as provided in Ar-

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[1] Article 531 was amended effective January 1, 1991, in a manner not relevant here, as follows:

La. Code Civ. Proc. Ann. art. 531 (West Supp. 1991):

When two or more suits are pending in a Louisiana court or courts on the same transaction or occurrence, between the same parties in the same capacities, the defendant may have all but the first suit dismissed by excepting thereto as provided in Article 925. When the defendant does not so except, the plaintiff may continue the prosecution of any of the suits, but the first final judgment rendered shall be conclusive of all.

ticle 925. When the defendant does not so except, the plaintiff may continue the prosection of any of the suits, but the first final judgment rendered shall be conclusive of all.

La. Civ. Code Ann. art. 3556 (31) (West 1953):

Thing Adjudged.-Thing adjudged is said of that which has been decided by a final judgment, from which there can be no appeal, either because the appeal did not lie, or because the time fixed by law for appealing is elapsed, or because it has been confirmed on the appeal.

La. Rev. Stat. Ann. 13:4231 (West 1991):

Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:

(1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.

(2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action of those causes of action.

(3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

Johnson Act, 28 U.S.C. § 1342 (1982)

The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a ratemaking body of a State political subdivision, where:

(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,

(2) The order does not interfere with interstate commerce; and,

(3) The order has been made after reasonable notice and hearing; and,

(4) A plain, speedy and efficient remedy may be had in the courts of such State.

June 25, 1948, c. 646, 62 Stat. 932